Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-10-92
PEH SWEE CHIN, WAN YAHYA AND MOHAMED DZAIDDIN FCJJ
29 JUNE 1995

Companies and Corporation *— Winding up — Priorities — Sales tax — Whether has priority over floating charge — Effect of s 69 of the Sales Tax Act 1972 — Companies Act 1965 ss 291 & 292 — Government Proceedings Act 1956 s 10(1) — Sales Tax Act 1972 s 69(1)*

Statutory Interpretation *— Canons of construction — Specialia derogant generalibus — Special provisions regarding priority of debts in insolvent company — Whether should prevail over conflicting earlier general provisions regarding priority of government debts — Companies Act 1965 ss 291 & 292 — Government Proceedings Act 1956 s 10(1)*

Statutory Interpretation *— Construction of statutes — Mandatory or directory — Provision that liquidator should set aside money for payment of sales tax — Whether payment of tax ranked in priority to all other secured debts — Whether provision is mandatory or directive — Sales Tax Act 1972 s 69(1)*

Castwell Sdn Bhd ('Castwell') went into voluntary liquidation on 14 July 1986, and the plaintiff was appointed as its liquidator. The amount of Castwell's assets was insufficient to meet the general and preferential debts of the company, and the plaintiff found himself in a predicament as to whether the sales tax due to the Director of Customs, Federal Territory ('the Customs') was to be settled in priority to the claim by MIDF debenture holders under a floating charge created by Castwell ('the debenture holders'). The liquidator took the view that the sales tax, which is a federal tax within the meaning of s 292(1)(f) of the Companies Act 1965 ('the CA'), had a lower priority than the debenture holders' claim. However, the Customs argued that s 69(1) of the Sales Tax 1972 ('the STA') conferred the right on the Custom to be ranked before other claims and prevailed over s 292 of the CA, following the maxim *lex posterior derogat priori* and *generalia specialibus non derogant.* It was also argued that s 10(1) and (2) of the Government Proceedings Act 1956 ('the GPA') would in any event confer priority of the payment of the sales tax. The High Court held that s 69 of the STA was an administrative direction, hence, the Customs were not entitled to any priority. The Customs have appealed. The issue before the court was whether the sales tax had priority of payment over preferential payments and the claims of the debentures holders, pursuant to the relevant provisions in the CA, the STA and the GPA.

Held, dismissing the appeal:

(1) In terms of its construction, s 69 of the STA is directive in nature and merely directs the setting aside of moneys sufficient for

taxation, but does not provide that Government debts shall rank in priority to all other secured debts. If the Legislature had intended otherwise, it would have conferred that privilege in clear and unequivocal words. The proper provisions to apply in deciding the priority of payments in respect of the sales tax debt are ss 291 and 292 of the CA.

(2) Section 10(1) of the GPA provides in general terms that all debts due to the Government shall enjoy preferential payments over other competing debts which arise subsequently. In contrast, ss 291 and 292 of the CA are special provisions dealing with the respective rights of secured and unsecured creditors in an insolvent company, and they expressly rank federal tax sixth in priority amongst other unsecured debts. When the floating charge crystallized, the debenture holders became secured creditors, whereas the sales tax claim by the Customs remained an unsecured civil debt.

(3) Discernibly, there is a conflict between s 292(1) and s 10(1). In this situation, the general rule of construction that applies is *specialia generalibus derogant* — special provisions derogate from general provisions. Hence, if a special provision is in conflict with an earlier general provision, the special provision will be treated as an exception to the general provision, and it follows that s 292(1) of the CA must be read as an exception to the general provision of s 10(1) of the GPA.

(4) In the present appeal, this intention was made even clearer by s 213 of the CA, which expressly binds the Government to the priority of debts as provided in the CA. Also, if the Government debts are to be paid in preference of the cost and expense of winding up, and if the funds available are limited, no winding up can be proceeded with, as there will be no funds to pay even for the filing fees of the petition and the liquidator's fees.

[Bahasa Malaysia summary

Castwell Sdn Bhd ('Castwell') telah digulung secara sukarela pada 14 Julai 1986, dan plaintif telahpun dilantik sebagai penyelesainya. Jumlah aset Castwell adalah tidak mencukupi untuk membayar hutang umum dan keutamaan syarikat itu, dan plaintif mendapati dirinya dalam dilema apabila menentukan sama ada cukai jualan yang terhutang terhadap Pengarah Kastam Wilayah Persekutuan ('pihak Kastam') perlu diberikan keutamaan dalam penyelesaian, ataupun tuntutan pemegang debentur MIDF di bawah caj terapung yang diwujudkan oleh Castwell. Penyelesai berpendapat bahawa cukai jualan yang merupakan suatu cukai persekutuan mengikut maksud s 292(1)(f) Akta Syarikat 1965 ('AS'), tidak mengutamai tuntutan pemegang debentur. Walau bagaimanapun, pihak Kastam menyatakan bahawa s 69(1) Akta Cukai Jualan 1972 ('ACJ') memberikan hak kepada pihak Kastam supaya ditempatkan sebelum tuntutan yang lain, dan Akta itu mengatasi s 292 AS, menurut maxim *lex posterior*

derogat priori dan *generalia specialibus non derogant.* Ia juga berhujah bahawa bagaimanapun, s 10(1) dan (2) Akta Prosiding Kerajaan 1956 ('APK') tetap memberikan keutamaan kepada pembayaran cukai jualan. Mahkamah Tinggi memutuskan bahawa s 69 ACJ adalah suatu arahan pentadbiran, lantaran itu, pihak Kastam tidak mendapat sebarang keutamaan. Pihak Kastam telah membuat rayuan. Isu yang dihadapkan ke mahkamah ialah sama ada bayaran cukai jualan mengutamai bayaran keutamaan dan tuntutan pemegang debentur mengikut peruntukan yang relevan di dalam AS, ACJ dan APK.

Diputuskan, menolak rayuan itu:

(1) Mengikut pentafsirannya, s 69 ACJ adalah bersifat arahan, dan hanya mengarahkan pengenepian wang yang mencukupi untuk pencukaian, tetapi tidak menyatakan bahawa hutang Kerajaan harus mengatasi kesemua hutang bercagar yang lain. Jika badan perundangan mempunyai niat yang sebaliknya, ia tentu akan menyatakan keistimewaan itu dalam perkataan yang jelas dan tidak taksa. Peruntukan yang betul yang terpakai dalam penentuan keutamaan bayaran hutang cukai jualan ialah ss 291 dan 292 AS.

(2) Seksyen 10(1) APK memperuntukkan secara umum bahawa kesemua hutang yang kena dibayar kepada Kerajaan harus menikmati pembayaran keutamaan dan mengatasi persaingan daripada hutang yang lain yang wujud selepasnya. Sebaliknya, ss 291 dan 292 AS merupakan peruntukan khas berkenaan dengan hak pemiutang bercagar dan tak bercagar masing-masing dalam sebuah syarikat yang tidak solven, dan telah secara nyata meletakkan cukai persekutuan di tempat yang keenam di antara hutang tak bercagar yang lain. Apabila caj terapung itu telah bertukar menjadi caj tetap, pemegang debentur itu telah menjadi pemiutang bercagar, manakala tuntutan cukai jualan oleh pihak Kastam itu masih merupakan suatu hutang sivil tak bercagar.

(3) Nampaknya, terdapat suatu percanggahan di antara s 292(2) dan s 10(1). Dalam keadaan ini, rukun umum pentafsiran yang terpakai ialah *specialia generalibus derogant* — peruntukan khas menjejaskan peruntukan umum. Jadi, jika suatu peruntukan khas adalah bertentangan dengan peruntukan umum yang lebih awal, peruntukan khas tersebut akan dianggap sebagai suatu pengecualian kepada peruntukan umum, dan ekoran itu, s 292(2) AS mesti dibaca sebagai suatu pengecualian kepada s 10(1) APK.

(4) Dalam rayuan ini, niat ini adalah lebih jelas lagi akibat s 213 AS, yang telah secara nyata mengikat Kerajaan kepada keutamaan hutang seperti yang telah diperuntukkan oleh AS. Lagipun, jika pembayaran hutang Kerajaan mengatasi kos dan perbelanjaan penyelesaian, dan jika wang yang terdapat hanyalah terhad, tiada penyelesaian akan dapat dijalankan, kerana tidak terdapat wang untuk fee pemfailan petisyen dan fee penyelesai sekalipun.

Notes

For cases on priorities in winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 538–544.

For cases on determination as to whether a statutory provision is mandatory or directory, see 11 *Mallal's Digest* (4th Ed) paras 1328–1333; [1993] Mallal's Digest 1254.

Cases referred to

Anuarul Aini & Anor v Ketua Pengarah Kastam dan Eksais Di Raja Malaysia, Johore Bahru [1991] 1 MLJ 360 (folld)
Corp of Madras v Electric Tramways Ltd AIR 1931 Mad 152 (folld)
Evans v Rival Granite Quarries Ltd [1910] 2 KB 979 (refd)
Federal Commissioner of Taxation & Anor v Official Liquidator of EO Farley Ltd (In Liquidation) & Anor (1940) 63 CLR 278 (folld)
Golden Palace Musical Hall Sdn Bhd, Re [1988] 2 MLJ 634 (not folld)
Governments Stock and Other Securities Investment Co Ltd v Manila Railway Co Ltd & Ors [1897] AC 81 (refd)
Hubbuck v Helms (1887) 56 LJ Ch 538 (refd)
Illingworth v Houldsworth [1904] AC 355 (refd)
Raja Arshad bin Raja Tun Uda & Anor v Director-General of Inland Revenue [1990] 1 MLJ 106 (distd)
Robson v Smith [1895] 2 Ch 118 (refd)
Your Size Fashions Ltd, Re [1990] NZLR 727 (refd)

Legislation referred to

Companies Act 1965 ss 191, 213, 275, 291, 291(1), (2), 292
Government Proceedings Act 1956 s 10(1), (2)
Real Property Gains Tax Act 1976 s 21B
Sales Tax Act 1972 ss 6(a), 22(2), 23, 69, 69(1),70
Sales Tax Assessment Act (No 1) 1930–1935 s 32 [Aust]
Companies Act 1899 [Aust]

Mohd Bazain (Senior Federal Counsel) for the appellant.
Izabella de Silva (*Iza Ng Yeoh & Kit*) for the respondent.

Cur Adv Vult

Wan Yahya FCJ: Castwell Sdn Bhd ('Castwell') went into voluntary liquidation on 14 July 1986, and the plaintiff, Eu Her Chye, was appointed as its liquidator.

In the course of his liquidatorship, the plaintiff ('the liquidator') found himself in a predicament as to whether a sum of RM351,295.67 in respect of sales tax due and payable before the winding-up proceedings by Castwell to the Director of Customs Federal Territory ('the Customs') was to be settled in priority to the claim by MIDF debenture holders ('the debenture holders'). Needless to say, the amount of Castwell's assets available at that time was clearly insufficient to meet the general and preferential debts of the company.

So, in May 1987, the liquidator wrote to the Customs expressing his view on the construction of s 292 of the Companies Act 1965, and invited the Customs to make its comments. The pertinent parts of that letter reads:

> So far as the assets of the company available for payment of general creditors are insufficient to meet any preferential debts specified in sub-s (1)(b), (d) and (e) and any amount payable in priority by virtue of sub-s (3), those debts shall have priority over the claims of the holders of debentures under any floating charge created by the company, and shall be paid accordingly out of any property comprised in or subject to that charge.
>
> In this subsection, the Companies Act 1965 has given s 292(1)(b), (d) and (e) and s 292(3) priority over floating charges but excludes s 292(1)(f) from such priority.
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> As s 292(1)(f) refers to federal tax, we would seek your authority to confirm that sales tax being a federal tax ranks after the floating charge but before the unsecured creditors.

It would appear from the above correspondence that the liquidator regarded the sales tax claim as a federal tax falling within the meaning of s 292(1)(f), and as such it enjoyed a lower priority than the debenture holder's claim.

On 20 July 1987, the Customs responded by reproducing the entire provisions of s 69 of the Sales Tax Act 1972, and with reference thereto remarked that the tax had to be paid.

The liquidator obviously was not sufficiently persuaded by the reply, as he was of the view (no doubt on being legally advised) that s 69 of the Sales Tax Act 1972 is not derogative of the provisions of s 292 of the Companies Act 1965, hence the filing of this originating summons in the High Court for the following directions.

(i) Whether, on the true construction of s 69(1) of Sales Tax Act 1972, the sales tax has priority of payment over preferential payments and the claims of the holders of debentures under a floating charge created by the company in view of the provisions contained in ss 275 and 292(1)(f) and (4) of of the Companies Act 1965.

(ii) In the event that the court should rule in favour of priority of sales tax, the plaintiff seeks an order that the costs, charges and expenses of and incidental to the winding up be paid in priority to the sales tax.

The stand taken by the Customs in the High Court was based on the argument of a conflict between s 69(1) of the Sales Tax 1972 and s 292 of the Companies Act 1965, in which case the maxim *lex posterior derogat priori* should apply and, secondly the Sales Tax Act 1972 being a special law enacted after the Companies Act 1965, the principle of *generalia specialibus non derogant* should likewise be applied. Lastly, counsel contended that s 10(1) and (2) of the Government Proceedings Act 1956 would in any event confer priority of the payment of the sales tax over claim of the debenture holders.

The learned judge then adopting the same rationale as in *Anuarul Aini & Anor v Ketua Pengarah Kastam dan Eksais Di Raja Malaysia, Johore*

A *Bahru* [1991] 1 MLJ 360, held that s 69 of the Sales Tax Act 1972 is an administrative direction, and as such the provisions of that section did not conflict with that s 292 of the Companies Act 1965. Accordingly, the learned judge held that the maxim *lex posterior derogat priori* did not apply, and so he ruled that the Customs were not entitled to any priority under
B s 69 of the Sales Tax Act 1972.

The central point of argument before the High Court appeared to have been for the most part directed at the implication on s 292 of the Companies Act 1965 and s 69 of the Sales Tax Act 1972. Perhaps for that reason, another relevant provision of the law, ie s 10(1) of the Government
C Proceedings Act 1956 was not adequately adjudicated on.

For the purpose of deciding this appeal, we feel that we need only consider the law applicable at the time when the claim was made by the Customs and the priority of such claim as provided by the appropriate law.

The first of the three cited provisions of the law is s 69 of the Sales
D Tax Act 1972 which reads:

> Where after the passing of this Act an effective resolution is passed or an order is made for the winding-up of a company which is a licensed manufacturer the liquidator of the company shall give notice thereof to the Director General within fourteen days thereafter, and shall before disposing of any of the assets of the company set aside such sum out of the assets as
E appears to the Director General to be sufficient to provide for any sales tax that is or will thereafter become payable in respect of the company.

Two High Court authorities of particular application to the above section were cited in argument before us. The first of the two is the case of *Anuarul Aini & Anor v Ketua Pengarah Kastam & Eksais Di Raja Malaysia, Johore*
F *Bahru* [1991] 1 MLJ 360.

In that decision, the learned trial judge held, inter alia, that: (i) s 70 of the Sales Tax Act 1972 (in our appeal, s 69) merely sets out the duties of the receivers and does not provide a priority of payment for sales tax over other debts; and (ii) sales tax being a civil debt is subject to a
G preferential payment over other debts.

Counsel for the Customs made a bold attempt to extend the effects of priority on s 69(1) with the argument that since it is mandatory for the liquidator to set aside the sum and make payment in order of priority under ss 191 and 292 of the Companies Act 1965, and since the authority
H to collect the same is contained in s 69(1) of the Sales Tax Act 1972, then these three sections which form part of the sales tax recovery process must be read together to mean that s 69 too is similarly clothed with priority. To put it in other words, Encik Bazain, counsel for the Customs' argument is s 69 of Sales Tax Act 1972 when read with ss 191 and 292 of the Companies Act 1965, will give it an implied priority over other debts.

I This is particularly, as mentioned earlier, a brave attempt at reargument of the law in view of the statement made from the Bar table that the issue in *Anuarul*'s case on s 69 was subsequently taken up, argued before and confirmed by the Supreme Court. However, the issue on

s 10(1) of the Government Proceedings Act 1956 was not taken up and hence, there was no written judgment on s 10(1). A

We have been invited to consider *Anuarul*'s case afresh and having done so, we have with respect, arrived at the same conclusion on the issue of s 69 as the previous panel of the Supreme Court and the trial judge did.

Out of the numerous authorities cited before the learned trial judge in *Anuarul*'s case, we need only consider two. The first is a High Court of Australia's decision on an appeal from the Supreme Court of New South Wales (*Federal Commissioner of Taxation & Anor v Official Liquidator of EO Farley Ltd (In Liquidation) & Anor* (1940) 63 CLR 278). This case emanates from the rights of the Commonwealth and State over debts due to the Crown in a winding up of an insolvent company under the Companies Act 1899 (NSW). It was decided, inter alia, on the construction of s 32 of the Australian Sales Tax Assessment Act (No 1) 1930–1935, the provision of which reads: B C

> Where a company is being wound up the liquidator of the company shall give notice to the commissioner within fourteen days after the approval of the shareholders for the winding up has been given, or the order for the winding up has been made, and shall set aside such sum out of the assets of the company as appears to the commissioner to be sufficient to provide for any tax that then is or will thereafter become payable. D

Section 69(1) of our Sales Tax Act 1972 which is parallel to the Australia's s 32 reads: E

> Where after the passing of this Act an effective resolution is passed or an order is made for the winding-up of a company which is a licensed manufacturer the liquidator of the company shall give notice thereof to the Director General within fourteen days thereafter, and shall before disposing of any of the assets of the company set aside such sum out of the assets as appears to the Director General to be sufficient to provide for any sales tax that is or will thereafter become payable in respect of the company. F

Latham CJ held that this provision of the Australian legislation could only operate in aid of any priority which may exist according to law, but that section by itself does not purport to create any priority. With reference to the imprecise amount which is required by the section to be set aside, the learned CJ reasoned: G

> In the first place it should be noted that the duty of the liquidator is to set aside such a sum out of the assets of the company as appears to be sufficient to the commissioner to provide for tax. The statutes do not require the commissioner to specify some precise amount of tax as being due. Indeed, the sections relate not only to tax that then is payable but also to tax which 'will thereafter become payable'. It is, therefore, evident that the sum to be set aside in pursuance of the statutes may prove not to be the sum that is actually payable. If the sections were dealing with priority of debts they would surely deal with the amounts which the liquidator would be justified in paying, and bound actually to pay, to the taxing authority in due course of the winding up. It can hardly be contended that the sections give priority to the Commonwealth over other creditors in respect of sums which the H I

A commissioner estimates as necessary to provide not only for taxation due, but also for taxation which may become payable. After the commissioner had fully complied with the section it would still be necessary for the commissioner to establish the amount and validity of any claim made. Thus the statutes do not give a right to the Commonwealth to receive the sum which is set aside

B This duty of the liquidator to set aside moneys to provide for taxation is further commented on by Starke J at p 296 of the same judgment as follows:

> I think, upon whether the Acts appropriate and charge the moneys set aside with payment of the taxation for which they are set aside or whether they are
> C merely administrative provisions directing the retention of funds to meet taxation before any distribution of assets is made but in no wise affecting substantive rights whether of priority or otherwise. ...
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> The first limb of s 59 of the Federal Act (identical with s 32 Sales Tax Act) merely directs the setting aside of moneys sufficient to provide for
> D taxation. It does not provide in terms that Commonwealth taxation shall rank for payment in priority to all other claims and such a privilege should be conferred in clear and unequivocal words and not by mere implication.

On the same topic of the *Federal Commissioner of Taxation* case, Evatt J considered the terms of the section merely as a direction to the liquidator to set aside moneys pending the final adjustment of the rights of creditors
E and at p 327 therein he remarked:

> As Mr Maughan pointed out in his able argument, the Commonwealth enactments: (a) do not purport in terms to deal with priority at all; (b) leave untouched any prerogative rights of the Crown; and (c) do not attempt to impose upon the liquidator any other duty than that of 'setting aside' the
> F money. If so, it seems right to conclude that the sections are merely administrative provisions designed to secure the setting aside of the money pending final administration, all questions of priority and preference being determined by the law to be found elsewhere than in the section.

We are entirely in agreement with the above rationale. If at all the Customs
G has a prior right, it must be a right over a debt as a whole where the amount is specified. Section 69 of our Sales Tax Act 1972 does not, in terms of its construction, direct payment away of the money so set aside nor does it instruct in any way how that money is to be applied, and yet the Sales Tax Act 1972 was enacted well after the Companies Act 1965. The only requirement contained in that section is for the liquidator to set aside
H a sum sufficient to provide for tax payable then or thereafter. The sum to be set aside pursuant to the statute may not be necessarily the same as what is actually payable. The Legislature could not have forgotten about the priority right as contained in s 292 of the Companies Act 1965 when it enacted that provision on the Sales Tax Act 1972. On the true construction of these two sections, we conclude that the omission to mention both
I matters, ie on payment out and priority were deliberate acts of the Legislature. We are firmly of the view that s 69 of the Sales Tax Act 1972 is merely directive in nature. It merely directs the setting aside of moneys sufficient to provide for taxation but does not provide that Government

debts shall rank in priority to all other secured debts. If the Legislature had intended otherwise, it would have conferred that privilege in as clear and unequivocal words as possible. A

We were referred to the second case of *Re Golden Palace Musical Hall Sdn Bhd* [1988] 2 MLJ 634, wherein a different view was adopted. We were given to understand that the learned judge had arrived at that decision on the principle of *lex posterior derogat priori* on the view point that a conflict had existed between s 69 of the Sales Tax Act 1972 and s 292 of the Companies Act 1965. We have good reason to believe that had the aforecited case of *Federal Commissioner* been made available to him, he would have likewise found that s 69 of the Sales Tax Act 1972 to be a mere administrative direction and therefore, not derogative of s 292 of the Companies Act 1965. B C

The third case made available to us by way of additional authority is the Supreme Court case of *Raja Arshad bin Raja Tun Uda & Anor v Director-General of Inland Revenue* [1990] 1 MLJ 106. The following passages were highlighted [at p 107–108] as tending to show that s 292 (1) of the Companies Act 1965 does not apply to s 21B of the Real Property Gains Tax Act 1976: D

> There is no real lacuna in the law. In a winding up, federal tax ranks sixth as preferential debt as referred to earlier, ie by virtue of s 292(1) of the Companies Act 1965. Where, however, there is no winding up and a receiver and manager is appointed as in this case, the federal tax is to be paid in accordance with the taxing statute concerned. E
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> It is not therefore a question of whether the federal tax is a preferential debt. It is only a question of how and when that tax becomes payable and should be paid by the company being the 'chargeable' person under the Act.
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> In this case the acquirer did not comply with what it was statutorily bound to do under s 21B(1) of the Act but had instead passed the whole amount of the purchase price to the receivers. The receivers had therefore received a sum part of which they ought not to have received. The Director-General of Inland Revenue was entitled to the sum of $105,461.84 being the amount of tax payable on the disposal of the landed property. As far as the tax is concerned the question of priority does not arise. F G

Regrettably, we are unable to agree with the analogy between the above case and the present on as drawn up by counsel for the Customs. It is particularly interesting to note that although both s 69 of the 1972 Act and s 21B of the 1976 Act provide for the retention or setting aside of moneys payable in taxation, s 21B makes a specific mention of a computable amount as contrasted with s 69 which merely directs the Director-General to set aside 'such sum ... as appears to be sufficient', to provide for present and future taxes. However, the most distinguishing factor between *Raja Arshad*'s case and our present case lies in the factual event leading to the claim. In the former case, the company was not being wound up; in our case, a resolution for the voluntary winding up of Castwell has already been passed and a liquidator appointed. The situation has been succinctly laid down by the learned Hashim A Yeop Sani CJ (Malaya) in the first above cited paragraph of *Raja Arshad*'s case wherein he stated that federal H I

A tax should be paid in accordance with s 292(1) of the Companies Act 1965 in a winding-up proceedings, but when there is no winding up and a receiver is appointed, the tax should be paid out in accordance with the statute applicable in the circumstance.

We find further support for our interpretation of s 69 of the Sales B Tax Act 1972 within *Raja Arshad*'s case itself, which held, inter alia, at p 107 of that judgment there was no lacuna or conflict between s 69 of that Act and s 292 of the Companies Act 1965, as decided in *Re Golden Palace.*

Having found that s 69 of the Sales Tax Act 1972 conferred no priority to government debts, we are now faced with another issue, ie the C effect of s 10(1) of the Government Proceedings Act 1956 over s 292(1) of the Companies Act 1965.

For the purpose of our discussion, both sections are reproduced herein.

Section 10(1) of the Government Proceedings Act 1956:

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> All debts due and claims owing from time to time by any person to the Government, whether upon judgment, bond, or other specialty, or upon simple contract or otherwise, shall be entitled from the date of the accrual thereof, respectively, to a preference of payment over all debts or claims of every kind which shall, subsequently to such date, have been contracted or incurred by or become due from such person to any other person E whomsoever.

Section 292(1) of the Companies Act 1965:

> Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts —
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> F (a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 281;
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> (b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of G allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding one thousand five hundred dollars or such other amount as may be prescribed from time to time whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the H winding up;
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> (c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;
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> (d) fourthly, all remuneration payable to any employee in respect of vacation I leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;
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> (e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by

the company as the employer or any person under any written law relating to employee superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

Sales tax is a federal tax within the meaning of s 292(1)(f) of the Companies Act 1965 and being a tax due to the government, it would likewise fall under the provision of s 10(1) of the Government Proceedings Act 1956. Discernibly, there is a conflict between the Government Proceedings Act 1956 which conferred priority to the sales tax above all debts and the Companies Act 1965 which ranked such tax as the sixth in priority amongst unsecured debts.

Where there are two conflicting provisions of the Legislature and the question arises which of the two should govern the case, it is the court's duty to see the terms of which provisions are more appropriate in the circumstance of the case. The principle of linguistic canons of construction on the use of legal maxim may provide the answer to our case.

The relevant maxim in the present appeal is *generalia specialibus non derogant* — general statements or provisions do not derogate from special statements or provisions, or conversely, *specialia generalibus derogant* — special provisions derogate from general. The Government Proceedings Act 1956 was enacted to provide generally the rights of the Government to sue, its liability, jurisdiction and procedure. Section 10(1) provides in non-specific and general terms that all debts due and claims owing to the government shall enjoy preferential payments over other competing debts or claims which arise subsequent to the date of accrual of such government claim. The phrase 'all debts due'; 'claims of every kind'; 'from such persons to any other person whomsoever' are plainly general words and general words are to be understood generally — *generalia verba sunt generalita intelligenda.*

In contrast, ss 291 and 292 of the Companies Act 1965 are special provisions dealing with a subject distinctive to companies. They relate to the respective rights of secured and unsecured creditors in a winding up of an insolvent company and make express mention of federal tax (which by virtue of s 23 of the Sales Tax Act 1972 or other related legislation is a debt due to the Government) as ranking sixth in the list of priority amongst other unsecured preferential debts. We have no hesitation in holding that s 292(1) of the Companies Act 1965 is a special provision dealing with a particular subject, and that it is in conflict with s 10(1) of the Government Proceedings Act 1956. Nevertheless, we must also assume that the Legislature must have had in mind the latter Act when enacting the subsequent Companies Act 1965, and did not intent to abrogate it altogether. The general rule of construction is such if having made the general Act the Legislature afterwards makes a special provision in conflict with the earlier legislation, the special provision so in conflict is treated as

a mere exception to the general provision — *Corp of Madras v Electric Tramways Ltd* AIR 1931 Mad 152, wherein Reilly J remarked:

> If the special Act is made after the general Act, the position is even simpler. Having made the general Act if the Legislature afterwards makes a special Act in conflict with it, we must assume that the Legislature had in mind its own general Act when it made the special Act, and made the special Act which is in conflict with the general Act, as an exception to the general Act. Where there was a conflict between s 27 of the Evidence Act 1872 and s 162 of Criminal Procedure Code 1898, as amended in 1923 (s 162 of Act No 2 of 1974), Din Mohammad J opined in *Hakam Khudayar v Emeror* AIR 1940 Lah 129, 152 ...

In our present appeal, this intention is made even clearer by the manifest terms of s 213 of the Companies Act 1965, which expressly binds the Government to the priorities of debts as provided in that Act. Section 213 reads:

> The provisions of this Part relating to the remedies against the property of a company, the priorities of debts and the effect of an arrangement with creditors shall bind the Government.

The drafters of this provisions must have not only been aware of s 10(1) of the Government Proceedings Act 1956, but they also had good reasons for framing s 292 of the Companies Act 1965. In a situation where the government debts are to be paid in preference of the cost and expense of winding up as well as the remuneration of the liquidator, and the government debt is in excess of the funds available in an insolvent company, no winding up can be proceeded with as there will be no funds to pay for the filing fees of the petition, let alone the liquidator's fees. Likewise, the four other preferential payments relating to the workmen's wages are consistent with the intention of the Legislature to give preference to the rights of a citizen to his earned income over the debts owed from the company to the government.

We are therefore of the view that the maxim *specialia generalibus derogant* applies, and s 292(1) of the Companies Act 1965 must be read as an exception to the general provision of s 10(1) of the Government Proceedings Act 1956 but otherwise the latter section prevails over other debts.

Lastly, it is incumbent upon us to determine on the facts of this case whether the claims by the debenture holders are in reality founded on secured debts within the meaning of s 292(1) of the Companies Act 1965. The two debentures dated 15 December 1981 and 20 April 1984 were secured by floating charges over the circulating assets of Castwell. The characteristic of a floating charge has been explained by Lord Macnaghten in *Governments Stock and Other Securities Investment Co v Manila Railway Co Ltd & Ors* [1897] AC 81 in the following terms at p 86:

> A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be

> a going concern, or until the person in whose favour the charge is created intervenes.

Seven years later, Lord Macnaghten observed in the case of *Illingworth v Houldsworth* [1904] AC 355 at p 358 on the same subject:

> A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined: a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

It is abundantly clear from the authorities on the subject that a floating charge being a present and not a future security does not affect any particular assets of the company until the happening of some event which causes it to be fixed. Thus the debenture holders have an immediate equity or charge on the property under a floating charge. The company on the other hand has the benefit or right to deal with the property so charged in the course of its usual business until the floating charge attaches itself as a fixed charge. This process is commonly known as crystallization.

When a company goes into liquidation, and a liquidator is appointed the floating charge automatically crystallizes — see *Hubbuck v Helms* (1887) 56 LJ Ch at p 538; *Robson v Smith* [1895] 2 Ch 118 at pp 124–125; *Governments Stock and Other Securities Investment Co Ltd v Manila Railway Co Ltd & Ors*; *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979 at p 990. On crystallization, the floating charge which had until then remained suspended, becomes fixed and attaches itself to the charged assets of the company. Simultaneously, the charge holders' interest becomes a proprietary interest capable of defeating the competing interests of unsecured creditors. The position of a secured creditor as referred to by Williamson J in *Re Your Size Fashions Ltd* [1990] NZLR 727 at p 733 is as follows:

> A secured creditor is entitled to stand aloof from the liquidation. Such a creditor may appoint a receiver and be entitled to interest due under an interest bearing security to the date of payment of principal sum. If he proves in liquidation, however, interest ceases at the date of winding up; (see *Re Securitibank Ltd* [1980] 2 NZLR 714 at p 728). The dominant position of a secured creditor is emphasized by the provisions of s 3(3) of the Insolvency Act 1967 (made applicable by s 307 of the Companies Act 1955).

The status of a secured creditor in our companies winding up is spelled out in s 291(2) of our Companies Act 1965:

> Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

A Section 292(1) then proceeds to set out the order of priorities amongst the unsecured debts.

As regards the rights of the debenture holders, the Customs' claim is based on the Sales Tax Act 1972. As a manufacturer, Castwell was liable under s 6(a) of that Act to pay sales tax for goods manufactured and sold. B By s 22(2) of the Act, the sales tax so chargeable has to be paid within 28 days. Since Castwell did not pay within that taxable period, s 23(1) empowers the Minister to recover it as a civil debt in court. The claim by the Customs for tax due and payable does not make it any different from other debts for which no security is given. The mere fact that the liquidator is directed under s 69 of that Act to set aside the sum due and payable does C not either turn the claim by the Customs into a secured debt within the meaning of ss 291 and 292 of the Companies Act 1965.

Anyhow, Parliament's intention to treat the Government's debt as an unsecured debt is manifest from the wording of s 292(1) itself, wherein the phrase 'other unsecured debts' was used in the operative sentence of that D section and subsequently itemizing federal tax as the sixth numbering such like debt which enjoyed priority.

On the aforestated reasonings and determination, we have arrived at the conclusion that the proper provisions to apply in deciding the priority of payments in respect of the claims for debts arising from non-payment of E sales tax is ss 291 and 292 of the Companies Act 1965, and the relevant date for the application of priority in this case is the date on which the liquidator was appointed. In our present case, the event took place on 14 July 1986. On that date, the floating charge became automatically crystallized and the debenture holders' claim was therefore transfixed into a secured debt. On the other hand, the sales tax claim by the Customs is F unaffected by the event and continues to retain its characteristic as an unsecured civil debt which ranked sixth in order of priority in that category of debts. The outcome from this situation in this case is obvious. The automatically crystallized debenture debts having attained the characteristic of a secured debt must be paid first in preference over the unsecured sales tax debts. G

Accordingly, we find that the learned trial judge had correctly determined the issue on priority. We therefore dismiss this appeal with costs.

Perhaps we should also mention here that an additional argument H based on the issue of trust which was not raised at the hearing in the court below nor in the appeal before us was put in by way of a subsequent written submission. In such circumstances, we do not consider it proper to deliberate on that issue in the present appeal.

Appeal dismissed.

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Reported by Prof Ahmad Ibrahim